

SECOND BITES AT THE APPLE IN FLORIDA FORECLOSURES MAY NOT BE SO SWEET

Financial services companies pursuing judicial foreclosures in Florida already face a host of unique and challenging hurdles. The varying and often-times court- or judge-specific procedural, substantive, and evidentiary requirements and expectations can create pitfalls for lenders seeking to foreclose on a mortgage. Two recent cases, from separate Florida District Courts of Appeal, raise the specter of yet another unfortunate outcome for lenders: dismissal of their entire action on statute of limitations (SOL) grounds. While the inconsistencies in the opinions may offer the silver lining of ultimate resolution by the Florida Supreme Court, lenders should discuss the possible implications of the SOL to strategic litigation and business decisions with counsel.

The dramatic rise in home loan mortgage default rates from 2007-2009 triggered a corresponding increase in foreclosure actions across the country. In Florida, many of these judicial foreclosure actions were placed on hold or delayed because of backlogs in the courts, changes in the legal landscape, or delay tactics employed by borrowers or their counsel, not to mention the lenders' own desire to undertake internal evaluations of the strengths, weaknesses, and merits of those cases. For a time, thousands of foreclosure cases with complaints filed four, five, or even six years ago, remained pending in the Florida courts. Often, rather than pursuing these aging cases, servicers dismiss and restart the foreclosures by filing a new complaint—a common practice in jurisdictions throughout the United States. However, depending upon when the initial complaint was filed, this strategy may now expose servicers pursuing Florida judicial foreclosures to motions to dismiss.

Beauvais

The uncertainty over the SOL issue in Florida was highlighted by the recent Third District Court of Appeals opinion in *Deutsche Bank v. Beauvais*, No. 3D14-575, Case No. 12-49315 (Fla. 3d DCA Dec. 17, 2014). The critical issue in *Beauvais*—and the question underlying the SOL debate in Florida—is the application of the SOL to successive foreclosure actions. Specifically: does acceleration of payments due in a dismissed foreclosure action start the “SOL clock” and bar subsequent foreclosure actions even when those actions are based on entirely new payment defaults.

In *Beauvais*, a mortgage loan servicer filed a 2007 foreclosure action, based on a September 2006 payment default. In the foreclosure complaint, the servicer accelerated the entire balance due and owing under the note and mortgage, demanding repayment of the full amount remaining on the loan. This foreclosure action was dismissed, without prejudice, when the servicer failed to appear at a court-ordered case management conference.

After dismissal of the initial foreclosure action, a condominium association (the Association) filed a second foreclosure action, based on its lien against the property for unpaid condominium dues. The Association obtained title to the property in 2011, subject only to the borrower's mortgage.

In December 2012, Deutsche Bank Trust Company Americas (Deutsche Bank), the current owner of the mortgage, filed a second foreclosure action related to the mortgage and note, based on an October 2006 payment default. Similar to the initial action, Deutsche Bank accelerated all payments and declared the entire outstanding balance immediately due and owing.

In an attempt to contest the Deutsche Bank foreclosure, the Association moved for summary judgment. The Association argued that acceleration of the payments due in the initial foreclosure action started the five-year SOL clock for the entire debt. The Association further argued that the dismissal without prejudice of the initial foreclosure action did not negate or otherwise invalidate the acceleration of the debt. In other words, the mere dismissal of the action did not restart the SOL clock.

The trial court agreed with the Association and granted its motion for summary judgment, holding that the SOL barred Deutsche Bank's foreclosure action because it was filed more than five years after the filing of the initial foreclosure complaint. The trial court further declared the mortgage null and void and quieted title to the property in favor of the Association. It was a victory for the Association. Not surprisingly, Deutsche Bank appealed.

On review, the Third District Court of Appeals focused on the nature of the dismissal. Because the original foreclosure had been dismissed without prejudice, the Court reasoned that the original acceleration of the debt had not been negated or decelerated. Therefore, the original acceleration event—*the filing of the first foreclosure complaint*—started the SOL clock. Nothing in the first foreclosure action invalidated the initial acceleration or reinstated

the installment nature of the mortgage contract and there were therefore no additional payments due after the acceleration. Without an obligation to make payments, there could not be any corresponding new payment defaults. This outcome would likely have been different if the case had been dismissed *with* prejudice.

Based upon its reasoning, the Court held that the original acceleration was never invalidated, and the SOL never stopped running. Accordingly, the SOL barred the second Deutsche Bank foreclosure action because that action was filed more than five years after the initial foreclosure complaint. The Court did, however, reverse the trial court's invalidation of the mortgage, holding that the SOL did not affect the validity of the mortgage as a lien on the property. Rather, it only affected Deutsche Bank's ability to institute a foreclosure action to seek repayment based on the Borrower's payment default. Nevertheless, it was a significant defeat for Deutsche Bank.

Bartram

Prior to *Beauvais*, on April 25, 2014, the Fifth District Court of Appeals decided *U.S. Bank Nat'l Ass'n v. Bartram*, No. 5D12-3823, 2014 WL 1632138 (Fla. 5th DCA Apr. 25, 2014). Unlike *Beauvais*, *Bartram* held that "a default occurring after a failed foreclosure attempt creates a new cause of action for [SOL] purposes, even where acceleration had been triggered and the first case was dismissed on the merits." *Id.* at *6. The *Bartram* Court found that if a lender's foreclosure action is dismissed and the borrower defaults after the original action commenced, the SOL's application to the original default does not prevent the lender from bringing a subsequent action based upon the new default. The *Bartram* case was the first time that a Florida appellate court expressly held that each default triggers a new cause of action for foreclosure for SOL purposes.

In *Bartram*, U.S. Bank's initial foreclosure action was involuntarily dismissed. Bartram's ex-wife, who owned a note and mortgage on the same property pursuant to a divorce action, brought a separate foreclosure action naming U.S. Bank, Bartram, and the homeowners' association as defendants. Bartram filed a cross-claim against the Bank in his ex-wife's action, seeking declaratory relief and to quiet title to the subject property. Bartram argued that because more than five years had passed since U.S. Bank had accelerated the full amount due under the mortgage, the SOL barred U.S. Bank from now enforcing its rights under the note and

mortgage. *Id.* at *1. The trial court agreed and entered judgment in favor of Bartram and against U.S. Bank.

The Fifth District Court of Appeals reversed the trial court, holding that as long as Bartram defaulted after the commencement of the first action, U.S. Bank was not barred from enforcing its rights under the note and mortgage, even though five years had passed since U.S. Bank's foreclosure action. The Court cited the Florida Supreme Court's previous opinion in *Singleton v. Greymar Associates*, 882 So. 2d 1004 (Fla. 2004), that any "subsequent and separate alleged default 'created a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action'." *Bartram*, 2014 WL 1632138 at *6. The *Bartram* Court held that any new payment default less than five years old presented a new cause of action, which was enforceable by U.S. Bank and not subject to the SOL. *Id.*

The Future: Florida Supreme Court?

As a result of *Beauvais* and *Bartram*, a clear circuit split now exists in the Florida appellate courts over the application of the SOL to judicial foreclosure actions previously dismissed without prejudice. *Bartram* is currently being briefed to the Florida Supreme Court, and it is possible that the conflict will be resolved by the end of 2015. Until the Supreme Court clarifies this issue, servicers should be mindful of the potential application of the SOL to foreclosure actions, particularly in cases where an initial breach and acceleration occurred more than five years ago. Servicers should carefully evaluate this issue before voluntarily dismissing and restarting any such cases. If they do not, they may find that the proverbial "second bite of the apple" is not as "sweet" as the first.